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FOO ING HWA

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED J
[CRIMINAL APPEAL NO: J-05-135-08]

C

18 MARCH 2011

CRIMINAL LAW: *Murder - Appeal - Appellant found guilty of striking deceased and causing death - Manner in which deceased sustained injuries - Whether there was major contradiction - Whether deceased died*

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from head injuries - Whether appellant had intention to cause death - Whether prosecution had established time of death

EVIDENCE: *Expert evidence - Conflicting expert evidence - Differing opinion as to cause of death - Cause of death identified as head injuries by government pathologist - Neurosurgeon identified cause of death as*

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congestions/aspirations - Government pathologist conducted post mortem report - He personally examined the deceased - Trial judge relied on evidence of government pathologist - Whether trial judge had fully appreciated evidence before him

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This was an appeal by the appellant against the decision of the High Court for convicting him of the murder of one Madam Lim Toh Eng ('the deceased') and sentencing him to death under s. 302 of the Penal Code. The incident took place at a sundry shop managed by the deceased's daughter-in-law ('PW8'). The

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appellant was alleged to have hit the deceased on the head with a piece of wood. The cause of death was identified, by the Government Pathologist ('PW14'), as head injuries. The eye witness account given by PW8, was that the deceased was resting on the recliner when the appellant struck her. The appellant

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denied he struck the deceased, he contended that she injured her head from a fall. DW3, a neurosurgeon in his evidence stated that the cause of death was congestions/aspirations. The appellant raised the following grounds of appeal: (i) there was major contradiction as to the manner in which the deceased sustained

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her injuries. He submitted that PW8's testimony was not

consistent with the version given by PW14 and DW3 *ie*, that the deceased was hit while she was standing; (ii) the cause of death was due to congestions/aspirations; (iii) there was no intention to cause death to the deceased; and (iv) the prosecution had failed to establish the exact time of death as the post mortem was conducted two days after the deceased's death.

Held (dismissing the appeal; upholding the conviction and sentence):
Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) The alleged contradiction on the manner in which the deceased sustained her injuries did not detract from the essential fact in issue *ie*, that the deceased sustained two head injuries which were confirmed by the two doctors. The question of whether the deceased sustained the injuries while she was sitting or standing was not relevant. (paras 16 & 17)

(2) The learned trial judge preferred and accepted the views of PW14, who examined the deceased's lungs and concluded that congestions/aspirations was not the cause of death. PW14 was also the person who conducted the post mortem on the deceased and had personally examined the lungs and the brain of the deceased before coming to his conclusion. DW3 on the other hand, was a neurosurgeon and not a pathologist. He did not examine the deceased and his opinion was based on the post mortem report. In fact he had admitted that the best person to testify as to the cause of death would be the pathologist who conducted the post mortem. The learned judge was entitled to come to a finding of fact on the evidence before him. He had not misdirected himself in any way and had fully appreciated the evidence on both sides before coming to a decision. (paras 18-21)

(3) The appellant's contention that the blow was not intended to cause death was a question of fact for the learned judge to decide. A reading from the judgment showed that the learned judge had carefully considered this question and had come to a finding of fact that the appellant had the intention to cause bodily injury. (para 23)

(4) It was not disputed that the post mortem was conducted two days after the demise of the deceased; this however would not cause any doubt in relation to the cause of death, as there were other evidence relating to the approximate time of death of the deceased. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi menyabitkannya atas pembunuhan Puan Lim Toh Eng ('si mati') dan mengenakan hukuman mati ke atasnya di bawah s. 302 Kanun Keseksaan. Insiden tersebut berlaku di sebuah kedai runcit yang diuruskan oleh anak mertua si mati ('PW8'). Perayu dikatakan telah memukul kepala si mati dengan sekeping kayu. Menurut pakar patologi kerajaan ('PW14'), punca kematian dikenal pasti sebagai kecederaan kepala. Keterangan saksi yang diberikan oleh PW8 ialah si mati sedang berehat di atas kerusi malas apabila perayu memukul si mati. Perayu menafikan beliau memukul si mati, beliau menegaskan bahawa si mati terjatuh dan mengalami kecederaan kepala. DW3, pakar bedah neuro, dalam keteranganya menyatakan punca kematian adalah kesesakan/aspirasi ('congestions/aspirations'). Perayu merayu atas alasan berikut: (i) terdapat percanggahan dalam cara si mati mengalami kecederaan. Menurut perayu keterangan PW8 tidak konsisten dengan versi PW14 dan DW3 yang berpendapat si mati telah dipukul ketika sedang berdiri; (ii) punca kematian si mati adalah kesesakan/ aspirasi ('congestions/aspirations'); (iii) perayu tidak ada niat untuk membunuh si mati; dan (iv) pihak pendakwaan telah gagal menubuhkan masa kematian memandangkan bedah siasat telah dijalankan dua hari selepas kematian si mati.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman):
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Percanggahan mengenai cara si mati mengalami kecederaan tidak menjejaskan fakta penting dalam isu, iaitu si mati mengalami dua kecederaan kepala yang telah disahkan oleh kedua-dua doktor itu. Persoalan sama ada si mati mengalami kecederaan semasa si mati sedang duduk atau berdiri tidak relevan.

(2) Yang arif hakim memilih dan menerima pandangan PW14, yang telah memeriksa paru-paru si mati dan membuat kesimpulan bahawa kesesakan/aspirasi ('congestions/aspirations') sebagai bukan punca kematian. PW14 juga telah menjalankan bedah siasat ke atas si mati dan telah memeriksa paru-paru dan otak si mati sebelum membuat kesimpulan. DW3 sebaliknya, adalah seorang pakar bedah neuro dan bukan pakar patologi. Beliau tidak memeriksa si mati dan pendapatnya adalah berdasarkan laporan bedah siasat. Malah beliau telah mengakui bahawa orang yang terbaik untuk memberi keterangan mengenai punca kematian adalah pakar patologi yang menjalankan bedah siasat. Yang arif hakim berhak membuat keputusan berdasarkan fakta-fakta keterangan di hadapannya. Yang arif hakim telah tidak tersalah arah dalam apa-apa cara dan telah pertimbangkam sepenuhnya keterangan kedua-dua pihak sebelum membuat keputusan.

(3) Hujahan perayu bahawa beliau tidak memukul si mati dengan niat untuk membunuh adalah persoalan fakta untuk pertimbangan yang arif hakim. Setelah meneliti penghakiman, di dapati bahawa yang arif hakim telah pertimbangkan dengan teliti soalan ini dan membuat keputusan bahawa perayu mempunyai niat untuk menyebabkan kecederaan.

(4) Ia tidak dipertikaikan bahawa bedah siasat telah dijalankan dua hari selepas kematian si mati; ini bagaimanapun tidak menimbulkan keraguan terhadap punca kematian, ini kerana terdapat keterangan lain yang berkaitan dengan masa kematian si mati.

Legislation referred to:
Penal Code, ss. 300(c), 302

For the appellant - Manian K Marappan; M/s Manian K Marappan & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman DPP; AG's Chambers

Reported by Melinda Robert

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JUDGMENT

Sulong Matjeraie JCA:

[1] The appellant, Mr. Foo Ing Hwa was convicted under s. 302 of the Penal Code and was sentenced to death by the B High Court Judge, Muar on 18 September 2008. He is alleged to have killed one, Madam Lim Toh Eng (the deceased) who was a 77-year old lady at the time of her death.

[2] The brief facts of this case are as follows. On 23 February C 2004, See Tin @ See Siew Tin, PW8 who is the daughter-in-law of the deceased was looking after a sundry shop at Batu 18, Parit Kangkar, Daerah Batu Pahat Johor Darul Takzim. The sundry shop is divided into three parts with the front of the shop used as sundry shop, the middle portion was used as the residence and D the rear portion was used as a kitchen and toilet. On the date in question the deceased was also in the sundry shop but was resting on a reclining chair in the living room.

[3] At about 11.15am the appellant came to the said sundry E shop using a red Produa Kembara Car. He parked the car in front of the shop. He then went into the shop where he ordered a packet drink from See Tin @ See Siew Tin, PW8. Thereafter he enquired from PW8 whether she was alone in the shop. PW8 said "No" but her husband was out running an errand. The appellant F then requested permission to use the toilet at the shop and although she initially refused the request, PW8 allowed him to do so. The appellant proceeded to the back of the shop to use the toilet. It is the prosecution's case that in using the toilet, the appellant had familiarized himself with the inside of the shop.

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[4] On finishing his drink, the appellant went back to his car and returned to the shop holding a piece of wood. On seeing this PW8 became frightened and retreated in the business section of the shop. The appellant approached PW8 and aimed a blow at her head using the piece of wood. She managed to duck the blow H which landed on her left shoulder. PW8 heard the appellant shout the words "Hendak rompak" and asked where her money was. PW8 replied the money was in the drawer after which the appellant asked for her jewellery to which she replied she had none.

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[5] While this commotion was going on, the deceased who was then resting on a reclining chair in the living room enquired as to what had happened? The appellant went up to the deceased and is alleged to have struck her head with the piece of wood he was holding. It is the evidence of PW8 that when she saw the appellant strike the deceased's head the deceased was still sitting on the chair. The deceased then fell from the chair on to the floor.

[6] PW8 said she then saw the appellant ransacking the drawers in the shop and scooping the money out. PW8 used the opportunity to dash out of the shop and run across the road where she stopped a passing vehicle and raised the alarm.

[7] The car PW8 stopped was driven by one, Abdul Latif. In the car was PW6, Mohamed Isa bin Koming who was known to PW8. On being informed of what had happened PW6 looked towards the shop and saw the appellant leaving the shop throwing away an object from his hand. The appellant then got into his Kembara car and headed towards Batu Pahat. Abdul Latif and PW6 gave chase to the appellant and at the same time PW6 informed his employer PW7 who was also on the road who in turn also gave chase to the appellant.

[8] PW8 did not accompany Abdul Latif and PW6 but instead returned to the shop to attend to the deceased. She found the deceased lying motionless on the floor with a bloodied head. PW8 then called the police and at about 1pm DSP Mohd Shahar bin Abdul Aziz, the Investigating Officer (PW12) arrived at the scene. It was PW12's evidence that when he saw the deceased lying on the floor, she was already dead. He arranged for the body of the deceased to be taken to the Batu Pahat hospital for a post-mortem.

[9] The appellant was finally apprehended at mile 80 of the Plus Highway in an oil palm plantation into which he had run to hide after abandoning his Kembara. The appellant gave himself up to the police to seek their protection when a crowd gathered at the vicinity where he was hiding.

[10] A post-mortem was conducted on the deceased by Dr. Shahidan bin Mohd Noor (PW14) two days after the death of the deceased. He confirmed the cause of death was due to head injuries.

[11] It was on the basis of the evidence outlined above that the judge came to a finding that a *prima facie* case had been made out against the appellant and called him to enter his defence to the charge.

[12] The appellant gave evidence on oath. The appellant did not deny that he was present at the shop on the day and time stated in the charge but it was his evidence that he had purchased a drink after which he asked to borrow money from PW8 to pay for his petrol and toll charges. PW8 reluctantly gave the appellant some money. The appellant said, at about that time, he observed an old lady who was wearing thick glasses get up and stumbled about with her head shaking after which the appellant said he saw this old lady fall down. He then asked SP8 whether she wanted to take the old lady to the hospital. According to the appellant, SP8 looked anxious and immediately ran out to the road and started screaming "rompak" "rompak". The appellant said he then saw five (5) road construction workers carrying "cangkul" and "iron pipes" coming towards him and because PW8 was screaming "rompak" "rompak" he got into his car and left the scene. From this defence put forward by the appellant, it is clear that it is his case that he did not in any way assault the deceased.

[13] After reviewing all the evidence at the end of the defence case, the learned judge found that the appellant had not created any reasonable doubt in the prosecution case and that the prosecution had proved the offence against the appellant beyond reasonable doubt.

[14] In bringing this appeal the appellant has raised the following grounds:

(i) Major contradictions on the infliction of the injury to the deceased;

(ii) Cause of death;

(iii) Whether the appellant intended to kill the deceased or intended to rob;

(iv) Time of death of the deceased.

We shall deal with each of these grounds in turn.

[15] First Issue: It Was The Contention Of The Defence That There Were Three Contradictory Versions Of How The Deceased Sustained The Injuries To Her Head Namely:

(i) PW8's version that the deceased was hit on the head while in the sitting position;

(ii) The version of the two medical experts that the deceased was hit while in the standing position;

(iii) The appellant's version that she fell down and that the appellant did not hit her.

[16] It is our view that the alleged contradiction on the manner in which the deceased sustained her injuries does not detract in any way from the essential fact in issue which is that the deceased sustained two injuries to her head which injuries were confirmed by both the Government pathologist (PW14) and the Neuro Surgeon (DW3).

[17] The evidence of the two doctors relating to these two injuries is consistent with the evidence of PW8 that she saw the appellant strike the deceased with a piece of wood. Whether the deceased sustained the injuries while she was in a sitting position or in a standing position is, in our view, quite irrelevant to the charge in view of the fact that the medical evidence confirms the head injuries suffered by the deceased and there is the eye witness account of PW8 that it was the appellant who inflicted the head injury on the deceased.

Second Issue: The Cause Of Death

[18] It is the contention of the appellant that the cause of death was not due to the head injuries as concluded by the Government Pathologist (PW14). It is the appellant's case that the deceased died due to the cause stated by DW3 in his evidence namely "it is likely the patient has fainted at the fall and the aspirated stomach contents entered into her lungs which is likely the immediate cause of death."

[19] On the other hand the prosecution contends that the cause of death was due to head injuries sustained by the deceased. Therefore there were two differing versions as to the cause of death before the learned judge. We find that the learned judge considered the evidence of both PW14 and the evidence of DW3 relating to the cause of death and he preferred and accepted the testimony of PW14 regarding the cause of death for the following reasons:

> PW14 conducted the post mortem on the deceased. He saw and examined her lungs and positively concluded that the said congestions/aspirations occurred at the time of death or after death had taken place and that the said congestions/aspirations were not the cause of death of the deceased. Being the person who conducted the post mortem, being the pathologist with years of experience, being the person who personally examined the lungs and the brain of the deceased and having dissected more than 1,000 dead bodies in the course of his work as a pathologist I have no hesitation to prefer and accept his testimony over the evidence given by DW3. Equally PW14 in his evidence in chief has enumerated in great detail his findings regarding the nature of the head injuries suffered by the said deceased … at the end of his post mortem, PW14 concluded that the deceased died due to the brain injuries she had suffered which he commonly referred to as "head injuries".

[20] The learned judge had clearly indicated why he preferred the evidence of PW14 and not DW3 in the following words:

> However DW3 is not a pathologist but a neuro surgeon. He did not examine the deceased and the nature of the injuries suffered by the deceased. He admitted that his opinion as regards to the cause of death of the deceased was merely based upon the reading of the post mortem report. He readily agreed that the best person to testify as regards to the injuries and the cause of death would be the pathologist who conducted the post mortem examination on the deceased.

[21] Having fully considered the evidence of the two doctors the learned judge came to a finding of fact that the death of the deceased was caused by head injuries. In our judgment the learned judge was fully entitled to come to that finding of fact on the evidence before him. In doing so the learned judge had not misdirected himself in any way and had fully appreciated the

evidence led by both sides before he came to his decision. Therefore we find no cause for appellate intervention with such finding.

Third Issue – Intention

[22] It was the contention of the appellant that he had no intention to cause the death of the deceased and that if at all there was a blow it was delivered in the heat of the moment while committing the robbery. The first line of defence by the appellant was that he never touched the deceased. This is clearly not borne out in the evidence adduced in this case. The eye witness account of PW8 that the appellant had hit the head of the deceased with a piece of wood is amply corroborated by the medical evidence of PW14 who confirmed that the deceased's cause of death was due to head injuries.

[23] With regards to the appellant's contention that if there was a blow it was not intended to cause death, whether or not there was such an intention was a question of fact for the learned judge to decide. A reading of the judgment shows that the learned judge carefully considered this question and came to the finding that the appellant had the intention to cause bodily injury which is within the ambit of s. 300(c) of the Penal Code. This is what the learned judge said:

> Now coming back to the case before me, what kind of intention can be inferred from the act or conduct of the accused? The accused came forthright to the deceased after hitting PW8. He aimed his blow to hit the deceased directly on her head unhesitatingly. He hit the deceased at least twice, once at the forehead and the other, behind the left ear (according to the expert opinion of PW14). He used a piece of wood about 2 to 2 ½ feet long only a bit less thicker than exhibit P20. He aimed his blows at the most vulnerable and exposed part of the human body. By any reckoning the piece of wood is lethal weapon when wrongly used. PW8 testified that the accused "... terus menghayunkan kayu tersebut kearah kepala Ibu mertua saya dengan kuat ...". Meanwhile PW14 confirmed that the force applied to cause the injuries sustained by the deceased was considerable. At the material time, the deceased was merely sitting on the reclining chair, did not quarrel with the accused, did not resist the accused, did not provoke the accused, did not fight with the accused and did not say anything except to enquire from PW8

A what was happening. The deceased was an old woman about 77 years old then. PW8 was 54 years old. There was no reason at all whatsoever to hit the deceased in the manner aforesaid. In such event, I cannot resist the finding that the blows inflicted by the accused upon the deceased was intentional and was committed with the intention of causing bodily injury.

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[24] In our judgment the findings of the learned judge regarding the intention of the appellant to cause bodily injury to the deceased is fully consistent with the evidence led in this case. We find no reason to interfere with this finding of facts.

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Fourth Issue – Time Of Death

[25] It was the contention of the appellant that the prosecution had failed to establish the exact time of death of the deceased. The appellant drew attention to the fact that the post mortem conducted on the deceased took place two days after her demise. It is not disputed that the post mortem was in fact conducted two days after the demise of the deceased. We find that this would not cause any doubt in relation to the cause of death as there was other evidence before the court relating to the approximate time of death of the deceased. PW8's eye witness account indicates that the death must have occurred shortly after the appellant arrived at the shop around 11.15am. The evidence of the Investigating Officer (PW12) is that when he arrived around 1pm he found that the deceased was already dead and arranged for her body to be taken for post mortem. Therefore we find that the time of death stated in the charge of between 11.20am to 11.40am is not inaccurate. The learned deputy had drawn our attention to the fact that the post mortem report states that the date of death was 20 February 2004 which is an error as the charge states the date of death was 23 February 2004. However, we do not think this mistake in the post mortem report (P38) is in anyway fatal to the prosecution case as there is other evidence before the court to establish that the deceased died on 23 February 2004 and the post mortem was conducted two days later. The evidence of the following persons established that the deceased died on 23 February 2004: PW8, PW12, PW6 and PW7.

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[26] We find no merit in this appeal and we therefore uphold the conviction and the sentence imposed by the learned trial judge. Accordingly we dismiss this appeal.

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